Supreme Court Docket No. S197694

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTATE OF WILLIAM A. GIRALDIN, DECEASED

TIMOTHY GIRALDIN, TRUSTEE TO THE WILLIAM A. GIRALDIN TRUST DATED FEBRUARY 11, 2002, AND PATRICK GIRALDIN,

Defendants and Appellants

vs.

CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN,

Plaintiffs and Respondents

SUPREME COURT
FILED
FEB 21 2012
Frederick K. Ohlrich Clerk
Deputy

After a Decision By the Court of Appeal,
Fourth Appellate District, Division Three
Case No. G041811

OPENING BRIEF ON THE MERITS

FREEMAN, FREEMAN & SMILEY, LLP
Stephen M. Lowe, Esq., SBN 45534
Jared A. Barry, Esq., SBN 221988
1888 Century Park East, Suite 1900
Los Angeles, California 90067
Phone (310) 255-6100
Fax: (310) 391-4042
Attorneys for Petitioners
CHRISTINE GIRALDIN, PATRICIA GRAY,
AND MICHAEL GIRALDIN
Plaintiffs and Respondents

Supreme Court Docket No. S197694

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTATE OF WILLIAM A. GIRALDIN, DECEASED

TIMOTHY GIRALDIN, TRUSTEE TO THE WILLIAM A. GIRALDIN TRUST DATED FEBRUARY 11, 2002, AND PATRICK GIRALDIN,

Defendants and Appellants

vs.

CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN,

Plaintiffs and Respondents

After a Decision By the Court of Appeal,
Fourth Appellate District, Division Three
Case No. G041811

OPENING BRIEF ON THE MERITS

FREEMAN, FREEMAN & SMILEY, LLP
Stephen M. Lowe, Esq., SBN 45534
Jared A. Barry, Esq., SBN 221988
1888 Century Park East, Suite 1900
Los Angeles, California 90067
Phone (310) 255-6100
Fax: (310) 391-4042
Attorneys for Petitioners
CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN
Plaintiffs and Respondents

TABLE OF CONTENTS

I. ISSUE PRESENTED 1

II. INTRODUCTION 1

III. STATEMENT OF FACTS 2

IV. PROCEDURAL HISTORY 6

A. Petitioners Filed A Petition and Amended Petition Seeking An Accounting and A Surcharge Against Tim 6

B. Tim Was Ordered To File An Accounting Beginning from the Inception of the Trust To Which Petitioners Filed Objections. 7

C. The Trial Court Concluded That Tim Had Breached His Fiduciary Duties and Rejected His Defenses to Liability. 8

D. Tim Appealed the Orders of the Trial Court. 14

E. The Court of Appeal Reversed the Trial Court's Orders. 14

V. LEGAL ARGUMENT 15

A. REMAINDER BENEFICIARIES HAVE STANDING TO SUE FOR BREACHES OF TRUST COMMITTED DURING THE SETTLOR'S LIFETIME WHILE THE TRUST WAS STILL REVOCABLE. 15

1. Revocable Trusts Are A Useful Tool For Asset Management and Estate Planning, But Also Create An Opportunity for Abuse by Third Party Trustees Which Necessitate Remedies for Injured Beneficiaries. 15

2. A Rule That Prohibits Remainder Beneficiaries From Pursuing Remedies for Breaches of Trust Committed During the Period of Revocability Would Render Various Probate Code Statutes Meaningless. 17

a. Sections 16001 and 16462 18

b. Sections 15800 and 15801 20

3. The Decision In Evangelho v. Presoto Comports with the Legislature's Intent to Provide a Remedy for Undetected Breaches of Trust Committed During the Period of Revocability. 24

4. The Court Of Appeal Opinion Is At Odds With The Common Law and Law of Other Jurisdictions. 30

5. The Legislature Has Authorized Remainder Beneficiaries To Recover Property on Behalf of the Trust That Was Wrongfully Taken Before the Beneficiaries' Interest in the Property Has Vested. 38

6. Petitioners Were Entitled to Pursue Their Rights to Redress Tim's Breaches of Trust as an Alternative to Contesting the Trust. 39

7. The Opinion Unnecessarily Confines Remedies for Breaches of Trust to Alternatives That Are Less Efficient and Practical. 39

a. Conservatorship 40

b. Elder Abuse 40

c. Action by Personal Representative. 41

VI. CONCLUSION 41

TABLE OF AUTHORITIES

STATE CASES

Clean Air Constituency v. California State Air Resources Board (1974)
11 Cal.3d 801 21

Copley v. Copley (1981)
126 Cal.App.3d 248 29

Delaney v. Baker (1999)
20 Cal.4th 23 41

Dry Creek Valley Ass'n, Inc. v. Board of Sup'rs of Sonoma County (1977)
67 Cal.App.3d 839 30

Evangelho v. Presoto (1998)
67 Cal.App.4th 615 .... 24, 25, 26, 27, 28, 37

Goodman v. Zimmerman (1994)
25 Cal.App.4th 1667 30

In re Estate of Young (2008)
160 Cal.App.4th 62 38

Jogani v. Sup.Ct. (2008)
165 Cal.App.4th 901 29

Johnson v. Kotcyk (1999)
76 Cal.App.4th 83 26

Klein v. United States of America (2010)
50 Cal.4th 68 22

Mejia v. Reed (2003)
31 Cal.4th 657 21

Rivero v. Thomas (1948)
86 Cal.App.2d 225 26

Steinhart v. County of Los Angeles (2010)
47 Cal.4th 1298 .... 27, 28

OUT OF STATE CASES

Brundage v. Bank of America (2008)
996 So.2d 877 34
Cloud v. United States Nat'l Bank of Oregon (1977)
280 Or. 83 ....34, 36, 37
In re Estate of West (Utah 1997)
948 P.2d 351 37
Siegel v. Novak (2006)
920 So.2d 89 ....34, 36
Smith v. Bank of Clearwater (1985)
479 So.2d 755 34

STATUTES

Civil Code § 22.2 30
Probate Code § 15002 30
Probate Code § 15200(b) 15
Probate Code § 15800 ....18, 20, 21, 22, 24, 25, 27, 28
Probate Code § 15801 ....17, 18, 20, 22, 23, 31
Probate Code § 16000 ....17, 18
Probate Code § 16001 ....18, 19
Probate Code § 16064(b) 24, 28
Probate Code § 16069 ....25, 28, 29
Probate Code § 16069(a) 28
Probate Code § 16069(b) 24, 25
Probate Code § 16420 29
Probate Code § 16420(b) 29
Probate Code § 16421 29
Probate Code § 16462 ....18, 19
Probate Code § 17006 40

Probate Code § 17200(b)(7) 24
Probate Code § 2580...27
Probate Code § 48(a)(1)...38
Probate Code § 825..40
Probate Code § 850(a)(3)(B) 38
Probate Code §15200(a) 15
Probate Code §16001..18
Probate Code §16069(a) 25
Uniform Trust Code, Section 1009..33
Welfare & Institutions Code, Section 15600, et seq...................................41

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) p. 644 29
Cal. Law Revision Commission Comment, P. C. § 15801 22
Cal. Law Revision Commission Comment, P.C. § 15800 22
Kirsten J. Colello, CRS Report for Congress: Where Do Older Americans Live? Geographic Distribution of the Older Population, March 5, 2007 34
Law Review Commission Comment, § 15002..30

TREATISES

Bogert's Trusts And Trustees, Section 964...32
Restatement Third of Trusts § 74 31

I. ISSUE PRESENTED

When a settlor of a revocable inter vivos trust appoints, during his lifetime, someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable, do the remainder beneficiaries have standing to petition the court for relief from breaches of fiduciary duty committed by the trustee during the period of revocability?

II. INTRODUCTION

This action concerns a trustee who committed numerous and large scale breaches of trust after he gained control of the assets of the settlor, his father, who had lost the ability to manage his own assets. The breaches were generally of two types. The first was purported gifts, loans and disbursements which were either not accounted for or were purportedly done pursuant to the verbal directions of the settlor. Essentially, the trustee's defense to these omissions was that he never bothered to read the trust and he simply did whatever his father told him to do. The second category was that the trustee channeled four million dollars of his father's estate into the trustee's startup company, all of which were lost. The trustee's primary defense was that he was not liable for this breach because his father had directed him to make this investment. Petitioners, three of the settlor's children[1], established at trial that both the trust and the California Probate Code (hereafter, "Probate Code" or "P.C.") required that the purported directions relied upon by the trustee had to be in writing and proved that the documents offered by the trustee were not understood by the settlor as written directions both because of the nature of the purported

---

[1] A fourth child, Philip Giraldin joined in the efforts of Petitioners but died while the appeal was pending.

directions and the father's diminished capacity. The trial court surcharged the trustee $5,051,663.00 for these breaches.

The Court of Appeal's opinion (the "Opinion") deprives the children, who were the remainder beneficiaries of the trust, of their right to remedy the breaches of trust made by the trustee because the breaches occurred while the trust was still revocable. The Opinion ignores the protections set forth in the Probate Code and previous case law to ensure that a non-settlor trustee complies with the trust, the Probate Code and the wishes of the settlor. By denying remainder beneficiaries the right to enforce the provisions of the Probate Code, the Opinion renders these protections meaningless. Without meaningful enforcement, elders will be at greater risk from financial abuse and their desire to transfer wealth according to their estate plans can be thwarted. The Opinion makes it impossible for the beneficiaries of the Trust to recover for the loss of their intended legacy.

III. STATEMENT OF FACTS

William Giraldin ("Bill") and Mary Frohm ("Mary") were married in 1959. (Reporter's Transcript ("RT"), Vol. II, 235:12 – 236:10; Respondent's Appendix of Trial Exhibits ("RA"), pp. 15 – 17 (Trial Exhibit ("TE") 159.) Bill had four children from a prior marriage, Jim, Patricia, Christine and Thomas, and Mary had three, Philip, Michael and Claudia. (*Id.*) In 1964, Bill and Mary had twin sons, Tim and Patrick. (*Id.*) The four original Petitioners were Patricia, Christine, Philip and Michael. (Appellant Timothy Giraldin's Appendix in Lieu of Clerk's Transcript ("AA"), Volume ("Vol.") I, Exhibits ("Ex.") 1, 10.) The original Respondents were Tim and Patrick. (*Id.* at Ex. 10.)

In his career, Bill founded a savings and loan association, which was ultimately acquired by Washington Mutual, resulting in Bill's acquisition of

millions of dollars in Washington Mutual stock. (RT, Vol. I, 124:23 – 26, Vol. II, 284:26 – 285:11; Vol. VIII, 1441:7 – 9.) Bill had always managed and controlled his and his family's financial affairs. (RT, Vol. I, 119:5 – 20; Vol. II, 237:10 – 25, Vol. III, 540:8 – 546:1; Vol. VI, 964:20 – 965:24, Vol. VIII, 1351:22 – 26.)

Bill executed the William A. Giraldin Trust which was originally executed by Bill as trustor and trustee on February 25, 1997, and amended four times ("the Initial Trust"). (Appellant Timothy Giraldin's Supplemental Appendix of Trial Exhibits ("ASA"), pp. 4 – 23, TE 27, pp. 24 – 26, TE 45, RA, pp. 7 – 8, TE 30, pp. 9 – 10, TE 31, pp. 11 – 12, TE 35.) The Initial Trust and amendments were all prepared by Bill's long time estate planning attorney, Scott Richmond, Esq. ("Richmond"). (RT, Vol. III, 609:5 – 610:12, 618:13 – 19, 619:24 – 623:24, 627:45 – 630:2.)

Only two months after the fourth amendment was executed, Tim referred Bill to a new estate planning attorney, James Mellor, Esq. ("Mellor"), in October 2001, for whom Tim's wife had previously worked. (RT, Vol. I, 105:26 – 106:5, 21 – 24, Vol. IV, 682:10 – 17, 21 – 25.) Tim arranged for and attended meetings between Mellor, Bill and him to create a new trust which named Tim as Trustee. (RT, Vol. I, 106:3 – 5, 112:2 – 9; 126:2 – 7, Vol. IV, 697:12 – 698:13, 703:12 – 704:21, 710:15 – 713:14.)

On February 11, 2002, Bill executed an entirely new trust instrument (the "Trust"), prepared by Mellor, in place of the Initial Trust and amendments. (ASA, Vol. I, pp. 95 – 146, TE 67.) Tim signed the Trust as the sole Trustee. (*Id.*) The Trust departs from Bill's earlier estate plan by immediately appointing Tim as the sole Trustee, whereas Bill was the trustee of the Initial Trust (and amendments) followed by four of his children as successor co-trustees. (ASA, Vol. I, pp. 4 – 26, TE 27 & 45, RA, pp. 7 – 8, TE 30, compared with ASA, Vol. I, pp. 95 – 146, TE 67.)

Bill was the sole beneficiary of the Trust during his lifetime and entitled to net income and principal of the entire Trust in his or the Trustee's discretion. (ASA, Vol. I, pp. 100 – 101, TE 67 (Article 3, § 3.1).) During Bill's lifetime, he retained the rights to: add or remove property from the Trust; amend or revoke the Trust; appoint or remove a trustee; and direct and approve the Trustee's actions, including investment decisions. (*Id.* at pp. 99 – 100 (Article 2, § 2.1 – 2.7).) However, these rights could only be exercised by a *signed writing by Bill delivered to the Trustee*. (*Id.* at p. 100 (Article 2, § 2.8).) After Bill's death, the remaining corpus was available for use by his surviving spouse, Mary, and then to be divided equally among all his children. *Id.* at pp. 101 – 103 (Article 4).) Only after Bill's death did Petitioners learn of the existence of the Trust, even though several of his children had been aware of, and named as successor trustees, in the Initial Trust. (RT, Vol. III, 552:19 – 553:8, 566:26 – 567:23, Vol. VI, 976:6 – 8, 1030:19 – 1031:8, 1119:21 – 25.)

Immediately prior to Tim becoming Trustee, the Trust owned approximately $3.4 million of Washington Mutual common stock which constituted about 50% of the Trust corpus, with the remainder of the corpus in diversified investments such as energy stocks, government securities, and real estate limited partnerships, and approximately $1 million in real estate, including his residence and a cabin in Fresno County, California. (RT, Vol. I, 124:23 – 26, ASA, Vol. II, pp. 304 – 307.)

SafeTzone Technology Corporation ("SafeTzone") was a start-up company partially owned and formerly controlled by Tim and Patrick. (RT, Vol. I, 79:10 – 80:24, 85:8 – 14, 158:15 – 166:3.) Immediately after Tim became trustee in February 2002, he began the process of liquidating nearly all of the Trust's securities and investing over four million dollars in SafeTzone over a period of less than one and a half years. (RT, Vol. I, 121:10 – 18, 140:7 – 14, ASA, pp. 319 – 321, 324 – 329, 332 – 333, 344.)

The Trust's dependable, diversified investments, built up by Bill over many decades, were traded for an investment in a risky start-up venture, SafeTzone, that had only one other financial investor at the time and had lost millions of dollars since its inception. (RT, Vol. I, 87:21 – 92:25, 92:24 – 95:6.)

On May 23, 2008, Tim delinquently filed a verified First Account Current (the "Accounting"). (RT, Vol. I, 166:8 – 167:25, ASA, Vol. II, pp. 245 – 348.) In the Accounting it was disclosed that as of December 31, 2007, the SafeTzone investment was essentially worthless. (RT, Vol. I, pp. 160:16 – 170:1, ASA, Vol. II, p. 348.)

The Accounting also disclosed numerous disbursements or loans to Tim and select family members for which Tim had no explanation or backup. (RT, at Vol. I, 177:13 – 179:11, 181:2 – 191:3, Vol. II, 216:13 – 225:5, 226:7 – 228:20, Vol. VII, 1162:9 – 1167:15, ASA, Vol. II, pp. 322 – 323, 330 – 331, 345 – 346.) One disbursement was made in violation of a restraining order. (RT, Vol. II, 209:8 – 216:12.) None of the loans was memorialized in writing and no terms of the purported loans are disclosed by the Accounting. (RT, Vol. II, 225:6 – 228:20, ASA, Vol. II, pp. 245 – 348.) Tim stated in his testimony that all of these loans were made pursuant to oral instructions from Bill and that they were forgiven according to the terms of the Trust. (RT, Vol. II, 420:15 – 20, 423:13 – 430:5.)

Finally, the Accounting shows a total of $4,050,000 invested in SafeTzone by the 2002 Trust between February 28, 2002 and May 6, 2003. (ASA, Vol. II, p. 344.) A portion of the money received by SafeTzone from the Trust ($50,000) on the same day of the Trust's initial investment is characterized as a "loan," rather than an investment. (ASA, Vol. II, p. 333.) There is no writing, however to substantiate the purported loan, there are no terms of the loan, and the Trust did not receive any SafeTzone stock or

other consideration for the $50,000 given to SafeTzone. (RT, Vol. II, pp. 225:6 – 226:6.) The only possible conclusion is that the purported, $50,000 "loan" is not a loan at all, but a thinly disguised gift to SafeTzone, which is tainted by Tim's ownership and control of SafeTzone at the time the gift was made.

IV. PROCEDURAL HISTORY

A. Petitioners Filed A Petition and Amended Petition Seeking An Accounting and A Surcharge Against Tim.

Petitioners learned through an informal accounting of the Trust provided by Tim in response to their demand about the Trust's four-million-dollar investment in SafeTzone and that substantial loans had been made by the Trust to Tim, Patrick and Thomas. (AA, Vol. I, Ex. 1, pp. 89 – 105.) On December 1, 2006 Petitioners filed their Petition against Tim, in his capacity as trustee, for: 1) Removal of Trustee; 2) Suspension of Powers; 3) Appointment of Successor Trustee; 4) Compel Trustee to Report and Account; and 5) Attorneys' Fees (the "Petition"). (AA, Vol. I, Ex. 1.) Petitioners alleged that Tim had breached various fiduciary duties by investing a majority of the Trust estate in SafeTzone and asked that Tim be required to provide an accounting of the Trust and SafeTzone during the period that Tim was trustee.

Petitioners also filed a Motion for a Preliminary Injunction to restrain Tim from making any distributions from the Trust or otherwise disposing of any Trust assets. On January 18, 2007, the court ordered that Tim was prohibited from distributing any Trust property, with the exception of $1,200.00 per month to Mary for her living expenses. No other distributions were permitted unless Petitioners consented in writing or upon further order by the court. (RT, Vol. II, 208:26 – 216:12, AA, Ex. 11, 294 – 295.)

On or about January 16, 2007, Tim filed his response to the Petition. In his response, Tim claimed that Bill directed and approved Tim's investment of Trust

money in SafeTzone and the loans to Tim and other beneficiaries of the Trust. Tim further alleged that the Petition violated the no contest provision of the Trust and requested the court to determine Mary's community property rights to Trust property. (AA, Ex. 6.)

On January 8, 2008, Petitioners filed an Amended Petition. The Amended Petition is similar to the Petition, but also requested orders that Tim be surcharged for the Trust's substantial loss of value resulting from his breaches of fiduciary duty. (AA, Ex. 10.)

In addition, the Amended Petition named Patrick as a respondent for conspiring with Tim to receive undue and improper benefits from the Trust vis-à-vis his ownership and control of SafeTzone, and through loans from the Trust, and requested that property received by Patrick from the Trust be returned to the Trust. (*Id.*)

B. Tim Was Ordered To File An Accounting Beginning from the Inception of the Trust To Which Petitioners Filed Objections.

On February 4, 2008, the court ordered, pursuant to the parties' stipulation, that Tim file an accounting of the Trust on or before April 11, 2008, covering the period from February 11, 2002 to December 31, 2007. Tim violated the Order by failing to file the Accounting timely. It was eventually filed and served on May 23, 2008 without any explanation for its tardiness. (RT, 166:17 – 167:25, ASA, Vol. II, pp. 245 – 348.)

On August 4, 2008, Petitioners filed their Objections to the Accounting. Petitioners objected to a number of entries in the Accounting and requested a surcharge against Tim for losses and unexplained disbursements by the Trust. The Objections further alleged that the Accounting was inconsistent with Tim's informal accounting provided before the litigation and his deposition testimony. (AA, Vol. I, Ex. 11.)

The Objections requested various surcharges against Tim for the investment in SafeTzone, the unsupported disbursements and loans to Tim, Patrick and their brother, Thomas, a payment to Mary in violation of the restraining order and other unexplained or inaccurate reporting. (*Id.*)

C. The Trial Court Concluded That Tim Had Breached His Fiduciary Duties and Rejected His Defenses to Liability.

Trial on Petitioners' Amended Petition and Objections to the Accounting occurred in October and November of 2008 before the Honorable David R. Chaffee of the Orange County Superior Court.[2] (RT, Vol. I – Vol. IX.) Tim contended that all of the Trust's transactions, including the SafeTzone investment and the loans to family members, were approved by Bill before he died, and that all of the loans were forgiven under the terms of the Trust. (RT, Vol. II, 339:11 – 341:23.) He testified that the loans were made pursuant to oral instructions from Bill. (RT, Vol. II, 420:15 – 20, 423:13 – 430:5.) He further testified that, though he signed the Trust as Trustee, he never read the Trust and was not familiar with its provisions, even though his attorney, Mellor, had told him to read the Trust. (RT, Vol. I, 74:13 – 25, Vol. II, 281:3 – 282:23, Vol. III, 512:22 – 513:14, Vol. V, 914:18 – 916:23.) Tim could not even identify the beneficiaries of the Trust. (RT, Vol. II, 153:3 – 8.) Tim testified that he believed that his only responsibility was to follow Bill's instructions concerning what to do with the Trust assets. (RT, Vol. II, 282:2 – 7.)

Tim also proffered documents that he contended were written instructions by Bill, as required by the Trust, to make the investment in SafeTzone. One of the documents was a "Gift Acknowledgment Form" (the "Gift Form") dated the same day that the Trust was created. (RT, 143:4 – 148:13, ASA, Vol. I, pp. 37 - 38.)

---

[2] The trial court also heard Mary's Spousal Property Petition and Petitioners' Objections thereto. The trial court's ruling on Mary's petition is not addressed herein.

The Gift Form, however, is a misleading document and does not, by its terms, authorize the investment in SafeTzone. Tim testified that the purpose of the Gift Form, which he drafted, was to memorialize a gift to his brother, Thomas (which, notably, is specifically characterized as a "loan" in the Accounting). (*Id.*, ASA, Vol. II, p. 345.) Tucked in at the end of the document is a paragraph which states, "[a]dditionally, after the trust has been set up William A. Giraldin and Timothy W. Giraldin will begin the process of selling stock and converting assets to fulfill the investment into SafeTzone . . . of $4 million." The first three paragraphs of the document relate solely to a gift of $150,000 to Thomas. The Gift Form was apparently executed before the Trust was created because it refers to a time "after the trust has been set up" and does not specifically direct Tim to invest four million dollars in SafeTzone. Two other documents were purportedly executed by Bill after Tim was appointed trustee and had control of Bill's assets - a Summary of Proposed Investment Terms dated February 15, 2002 and a Stock Purchase Agreement dated April of 2002. (ASA, Vol. I, pp. 43 – 45, 62 – 94.) Neither of these documents even purported to be instructions to Tim, as trustee, to make the investment in SafeTzone.

Both sides presented medical experts, who agreed that Bill was suffering from progressive dementia in 2002. They opined that, at the time the Trust was executed and Bill signed documents related to the investment in SafeTzone, Bill had mild to moderate dementia. Both provided testimony suggesting that it was unlikely Bill would have understood the risks and benefits of entering to the SafeTzone transaction.[3] (RT, Vol. III, 457:8 – 490:15, Vol. V, 776:8 – 807:12.)

---

[3] Petitioners' expert, Dr. Stephen Read, and the trial court reviewed home videos from 2001 – 2003 produced by Tim and Patrick, which supported their conclusions that Bill had diminished capacity during that time periods. (RA, Ex. pp. 18 – 20 (enclosed DVD); RT, Vol. V, 800:13 – 802:2, Vol. IX, 1695:6 – 1696:11.)

Tim's testimony at trial demonstrated his lack of responsibility in properly administering the Trust. He could not explain numerous disbursements from the Trust, failed to provide, or in some cases even look for, backup documentation to support disbursements, and admittedly comingled his personal funds with trust funds. (See, e.g., RT, Vol. I, 178:20 – 179:11, 185:16 – 186:24, 189:2 – 191:3, Vol. II, 201:2 – 207:4, Vol. III, 508:8 – 10.)

Tim testified that a July 7, 2003 reimbursement to himself for $20,000 from the Trust was for repairs and interior renovations to the Hume Lake cabin, which included the purchase of new beds for the cabin and fixing the roof. (RT, Vol. I, 177:13 – 179:11.) No invoices, receipts or other documentation was included in the Accounting that support this disbursement and the amount of the purported reimbursement appears excessive on its face. (ASA, Vol. II, p. 322.) Tim testified at trial that he could not find back-up documentation and that he never attempted to obtain credit card bills that may support his right to reimbursement. (RT, Vol. I, 177:13 – 179:11.)

In March 2004, Patrick received $17,500 for unspecified expenses. (ASA, Vol. II, p. 323.) Tim testified that, in fact, this money went to Mary, not Patrick, and that his verified Accounting was in error. (RT, Vol. I, 181:2 – 185:7.) Tim could not explain the purpose of this disbursement. (*Id.*) Additionally, in December 2004, a $30,000 disbursement was made to Tim for "medical expenses for William Giraldin, i.e., hospital bed, medications, transportation." (ASA, Vol. II, p. 323.) Again, Tim failed to provide any invoices, receipts or other documentation that support this disbursement. (RT, Vol. I, 185:8 – 191:3.)

In January 2007, a restraining order was issued against Tim, as trustee, permitting him to distribute a maximum of $1,200 per month to Mary from the Trust. Yet, the Accounting disclosed two (2) distributions to Mary above the

$1,200 monthly stipend after the restraining order was issued. On December 7, 2007, Tim distributed an additional $9,341.97 to Mary. (RT, Vol. II, 209:8 – 216:12, ASA, Vol. II, p. 331.) At trial, Tim testified that the money was used to "re-do" an outside deck at Mary's Residence and that he has no backup documentation to support this expenditure. (RT, Vol. II, 212:4 – 216:12.) Tim did not even attempt to obtain the consent of the beneficiaries to distribute additional Trust funds to Mary to improve the Residence as required by the restraining order, and Petitioners were not made aware of this additional distribution until the Accounting was provided. (*Id.*)

The Accounting also shows a number of loans to Tim and Patrick. Between March 2002 and May 2005, Patrick was purportedly loaned $155,600 from the Trust in ten (10) different transactions. (ASA, Vol. II, p. 345.) Tim testified that he has no knowledge of the reasons for any of these numerous loans to Patrick. (RT, Vol. II, 226:7 – 25.) Patrick also could not recollect the purposes of the loans and further testified that the money he received was gifted, not loaned, contrary to the characterization in the Accounting. (RT, Vol. VII, 1162:9 – 1167:15.) Tim was also purportedly loaned $77,600 from the Trust in two (2) different transactions. (ASA, Vol. II, p. 345.) Tim testified that he is not sure, but that he believes these loans were made to him to do landscaping at his personal residence. (RT, Vol. II, 227:15 – 228:5.) In addition, the Trust purportedly loaned Tim's brother, Tom, $225,000 because, as Tim testified, Tom "was doing something to his house," but he knew no further specifics. (RT, Vol. II, 226:26 – 227:14.)

At the conclusion of trial, the trial court ruled in favor of Petitioners. The trial court stated that Tim's argument "that this is what William Giraldin wanted, does not suffice. That desire, even if competently formulated by William Giraldin, was not properly documented, as required by the terms of the trust

document, I would say also by state law under the Probate Code." (RT, Vol. IX, 1691:21 – 25.) The trial court further concluded that "by 2001 William Giraldin was not sufficiently competent to make any decision that involves the kind of risk that the four-million-dollar SafeTzone investment represented" (*Id.* at 1692:1 – 3) and "his capacity to make the kind of serious business decision to take two-thirds of an estate that he expected would have to survive him for the long-term comfort and care of his wife in particular, was just not there." (*Id.* at 1696:7 – 11.)

The trial court also found that "Mr. Giraldin did something unique and unusual, even for a person under those circumstances. He surrendered to Tim Giraldin that very precious commodity, control of his own money and assets. The evidence also supports the finding that virtually every aspect of this trust was mismanaged, or poorly managed. The account in this case is largely a trumped-up fraud or a fiction. The disbursements ridiculous . . . It's all fictional. The marshalling of assets is virtually nonexistent, save and except for liquidating stocks to make a four-million-dollar investment. Otherwise, it appears the trustee was essentially not there, or out the door." (*Id.* at 1696:13 – 26).

The trial court issued its statement of decision on December 18, 2008. (AA, Vol. II, Ex. 21.) The trial court expressly found that Bill lacked the mental capacity to authorize and direct Tim to make the four-million-dollar investment in SafeTzone and that the documents proffered by Tim as written directions to make the investment did not constitute signed writings as required by the Trust.

Specifically, the statement of decision provides the following findings:

"15. The Court finds that Bill did not direct or authorize the foregoing purported disbursements, distributions and loans by the Trust in a manner required by the Trust and the Probate Code. The Court finds no evidence of a written direction by Bill delivered to the Trustee to authorize any of these transactions by the Trust or to relieve Tim of any of the

statutory trustee duties. The Court further finds that Bill lacked mental capacity to understand that certain documents proffered by Tim were written directions to the Trustee to authorize any of these transactions by the Trust or to relieve Tim of any of the statutory trustee duties. The court further finds that Bill was deprived of independent legal representation with regard to directing or authorizing actions of the Trustee since his estate planning attorney, James Mellor ("Mellor"), also acted as attorney for Tim as trustee. Mellor had been told that the $4,000,000 investment in SafeTzone was a "done deal" before Mellor began to advise Bill and therefore Mellor did not investigate its propriety and Bill's interests were purportedly being protected by SafeTzone's in-house counsel, Regan Kelly, who had a conflict of interest due to his ownership and employment by SafeTzone.

* * *

21. The Court finds that Bill was not sufficiently mentally competent in late 2001 and thereafter to analyze the benefits and risks of an investment in SafeTzone, a start-up venture with no significant assets or contracts for its products and services and a nominal amount of cash on hand, or to authorize and direct Tim to make such an investment.

22. The Court further finds that the documents presented by Tim as purported written directions by Bill to invest in SafeTzone – the Gift Acknowledgement Form, the January 29, 2002 and February 15, 2002 investment term sheets, the Common Stock Purchase Agreement and the Call for Investment dated February 22, 2002 – are insufficient written directions, even if Bill were sufficiently mentally competent to make such directions, which he was not."

(*Id.* at pp. 473 – 474.)

On December 19, 2008, the trial court issued its orders on the Amended Petition and Objections to the Accounting. (AA, Vol. II, Exs. 22,

23). The Order on the Amended Petition removed Tim as trustee, appointed a successor trustee, and surcharged Tim in the amount of $4,376,044.00. (*Id.* at Ex. 22.) The Order on the Objections to the Accounting surcharged Tim in the amount of $675,619. (*Id.* at Ex. 23.)

D. Tim Appealed the Orders of the Trial Court.

Tim filed a notice of appeal jointly with Mary and Patrick on March 10, 2009. (AA, Vol. II, Ex. 25.) Tim appealed the trial court's orders on the Amended Petition and Objections to the Accounting.

Tim filed his Opening Brief on February 3, 2010. Petitioners filed their combined Respondents' Brief on July 19, 2010. Tim filed his Reply Brief on October 8, 2010. On March 7, 2011, the Court of Appeal issued an order requesting further briefing from the parties relating to the issue of standing. Petitioners filed their Supplemental Brief in Response to the March 7, 2011 order on April 6, 2011. Tim filed a Supplemental Brief on April 26, 2011, and Petitioners filed a Reply Supplemental Brief on May 6, 2011. On June 2, 2011, Petitioners filed a Letter Brief in Response to the Court's March 7, 2011 order.

The parties presented oral argument on September 21, 2011.

E. The Court of Appeal Reversed the Trial Court's Orders.

On September 26, 2011, the Court of Appeal, Fourth Appellate District, issued the Opinion, which reversed the orders of the trial court. The Court of Appeal held that Petitioners lacked standing to assert claims against Tim for violations of fiduciary duties that occurred while Bill was still alive and the Trust remained revocable. The Opinion holds that, during Bill's lifetime, Bill retained the rights of ownership and control of the trust property, Tim's duties as trustee were owed solely to Bill, and not to Petitioners, and that even after Bill's death, the trustee duties were not retroactively owed to the beneficiaries. The Opinion further holds that Tim's only duty was to comply with what Bill instructed, and that Tim was

under no obligation to determine whether Bill lacked the necessary capacity to make a decision regarding what he wanted to do with his assets.

V. LEGAL ARGUMENT

A. REMAINDER BENEFICIARIES HAVE STANDING TO SUE FOR BREACHES OF TRUST COMMITTED DURING THE SETTLOR'S LIFETIME WHILE THE TRUST WAS STILL REVOCABLE.

1. Revocable Trusts Are A Useful Tool For Asset Management and Estate Planning, But Also Create An Opportunity for Abuse by Third Party Trustees Which Necessitate Remedies for Injured Beneficiaries.

Revocable inter vivos trusts are now widely used in California as a vehicle for asset management and a means to make testamentary dispositions of the settlor's property. These trusts avoid the necessity of costly and time-consuming conservatorships and probates because they are generally free from court supervision. A settlor of a revocable trust often acts as the trustee of the trust [see Probate Code §15200(a)], in which case the settlor manages the trust property during his lifetime and the trust merely acts as a will substitute, designating how the assets will be distributed upon the settlor's death.

Sometimes settlors of revocable trusts, like Bill in this case, name a third party to act as trustee during the settlor's lifetime and transfer property to that trustee for management. See P. C. § 15200(b). Where a settlor relinquishes control to a third party trustee because of old age and frailty, which is often the case, the opportunity for abuse by the trustee is created. A vulnerable settlor, who is not mentally competent to evaluate, direct or understand the trustee's actions, may not recognize a trustee's breach or

take action to protect himself and his assets. The abuse can occur without the knowledge of the settlor's family and heirs, and because of the lack of court supervision which would have been provided in a conservatorship, the trustee's misconduct may go entirely undetected until after the settlor dies.

A non-settlor trustee who manages the trust estate during the settlor's lifetime cannot escape liability for breaches of trust where the settlor dies without knowledge or mental capacity to prevent the trustee's misconduct. There must be a remedy. Thus, California law allows the trust's remainder beneficiaries to sue the trustee, after the settlor dies or becomes incompetent, for not following the trust, the trustee's duties under the Probate Code or the settlor's directions, and recover against the trustee for losses to the trust estate. In most cases, no one other than the remainder beneficiaries is motivated to ensure that the settlor's testamentary wishes are carried out and seek relief against a rogue trustee. A remainder beneficiary's ability to sue a non-settlor trustee for breaches of trust committed during the settlor's lifetime is necessary to protect the assets and testamentary intentions of the settlor, while also providing remedy to the class of persons who are harmed by and most likely to seek redress for trustee misconduct.

The Opinion eliminates the right to seek relief from the class of aggrieved parties who are most likely to seek redress for a trustee's misconduct. The Opinion holds that a remainder beneficiary lacks standing to challenge the trustee's actions that were taken during the period while the trust was revocable, no matter how egregious the conduct of the trustee. The Court of Appeal reasoned that the settlor, who retains control over the trustee's activities and rights to the trust property during his lifetime, should be able to do whatever he wants with his property and that the trustee is duty bound to comply with the settlor's wishes. The Opinion finds that

during the settlor's lifetime, the remainder beneficiaries are owed no fiduciary duties by the trustee and those duties cannot be applied retroactively once the settlor dies.

The Court of Appeal fails to consider, however, the protections set forth in the Probate Code and, in this case, the Trust, to ensure that the action by the trustee is actually what was directed or authorized by the settlor. The key issue that the Court of Appeal ignored is whether beneficiaries have standing to question if the settlor knowingly consented to the trustee's actions and, moreover, if the consent was given in a manner required by the trust instrument. In this case, the trial court expressly found that Bill was not competent to give consent to the SafeTzone investment, that the purported written consents to the investment proffered by Tim were invalid, and that there was no written consent whatsoever, as required by the Trust, for numerous loans and unsupported disbursements. The trial court thus followed the law by holding Tim responsible for breaches of fiduciary duty.

2. A Rule That Prohibits Remainder Beneficiaries From Pursuing Remedies for Breaches of Trust Committed During the Period of Revocability Would Render Various Probate Code Statutes Meaningless.

The Probate Code has various protections to ensure that a non-settlor trustee carries out the settlor's intentions. A non-settlor trustee of a revocable trust: (1) must follow the terms of the trust and abide by the trustee duties set forth in the Probate Code, except to the extent the trust instrument provides otherwise (P.C. § 16000); (2) must follow the written directions of the person holding the power to revoke (P.C. §16001); and, (3) is relieved from liability for a breach of trust so long as the person holding the power to revoke consents to the trustee's action (P. C. § 15801).

These provisions are meaningless unless the remainder beneficiaries are able to enforce them.

While the settlor is living and competent, the non-settlor trustee owes fiduciary duties only to the person holding the power to revoke, most often the settlor, and not to the beneficiaries. P. C. § 15800. The Probate Code requires that a non-settlor trustee of a revocable trust follow the written directions of the settlor (P. C. § 16001) and the settlor's consent to a trustee's action binds all beneficiaries who might try to complain after the settlor dies (P. C. § 15801). This is because a competent settlor retains control over the trust property and may direct the non-settlor trustee's actions. The Probate Code, however, also provides that the trustee is only relieved from liability for an apparent breach of trust if the settlor *directs* the trustee's action or otherwise *consents* to the breach of trust. See P. C. 15801, 16001§§. Where a particular method of consent is required by the trust, the trustee has a duty to follow the trust and obtain consent in that method. P.C. § 16000. Otherwise, the trustee is exposed to a surcharge action by the remainder beneficiaries after the settlor dies and the remainder beneficiaries' interest in the trust estate is vested. P.C. § 16462. *If a remainder beneficiary is unable to challenge whether consent was given or that the trustee followed the written direction of the trustee, these provisions would have no impact on the actions of a non-settlor trustee.*

a. *Sections 16001 and 16462*

Probate Code section 16001§§ provides in pertinent part that:

> "[T]he trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time (1) by the person then having the power to revoke the trust or the part thereof with respect to which the direction is given . . .."

Because the Probate Code requires that a trustee follow the written directions of the person holding the power to revoke, the trustee is not

liable to beneficiaries who might complain after the settlor dies for following those directions. Probate Code section 16462 provides that:

> "[A] trustee of a revocable trust is not liable to a beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, including a person to whom the power to direct the trustee is delegated."

Clearly, a statute relieving the trustee from liability to a beneficiary would be unnecessary if the trustee could have no liability in the first place. The clear import of these two sections is to give remainder beneficiaries the ability to challenge whether a trustee of a revocable trust was given and complied with the written directions of the settlor.

Upon becoming trustee, Tim owed fiduciary duties to Bill to comply with the Trust instrument (P. C. § 16000) and abide by the trustee duties set forth in the Probate Code. Under the Trust, Bill reserved rights to direct Tim's actions as trustee, a power also granted to Bill under the Probate Code. However, under Section 2.8 of the Trust, other than distributions to Bill, those actions could only be directed by Bill's signed writing delivered to the trustee, Tim. This provision required Tim to document Bill's intentions in order to protect Tim from the complaints of beneficiaries thereafter. Tim was unable to prove that he had obtained such written directions for the SafeTzone investment and various loans and other disbursements from the Trust. In fact, Tim would not have known that any directions had to be in writing since he never bothered to read the trust. Petitioners were able to establish in the trial court that, absent written directions by Bill, Tim should be held liable for the misconduct that constituted breaches of trust.

The Opinion does not address Sections 16001§§ and 16462 at all. Instead, the Court of Appeal sidesteps the issue of written consent relieving a trustee from liability by stating in a footnote that "if Bill's desires,

competently formulated, were actually carried out by Tim, then *Bill himself* could never establish that he had been damaged simply because Tim failed to document Bill's desires. The lack of documentation, in and of itself, is not a cause of action." (Opinion, p. 25, fn. 21.) This misses the point. Petitioners never argued that the lack of documentation creates a cause of action; rather, it precludes the Tim from using Section 16462 to relieve himself of liability for breaches of trust.

b. *Sections 15800 and 15801*

The Opinion's interpretation of Probate Code section 15800 is also problematic when read in conjunction with Probate Code section 15801 because the Opinion reads the former to cancel out the latter. The Court of Appeal relies heavily on Probate Code section 15800 to conclude that a remainder beneficiary never has standing to complain about actions taken by the trustee during the period of revocability. Section 15800 provides in pertinent part that:

> "[D]uring the time that a trust is revocable and the person holding the power to revoke the trust is competent:
>
> (a) [t]he person holding the power to revoke, and not the beneficiary, has the rights afforded to beneficiaries under this division [and]
>
> (b) [t]he duties of the trustee are owed to the person holding the power to revoke."

Because trustee duties are only owed to the settlor while the trust is revocable, the Court of Appeal reasons that those duties cannot "retroactively" be owed to the beneficiaries after the settlor dies. (Opinion, p. 21.)

However, Section 15800 does not expressly provide that beneficiaries lack eventual standing to sue a trustee for misconduct that occurred while the settlor was alive and competent, and the trust remained

revocable. Rather, the statute enunciates a rule that applies "during the time that the trust is revocable." Section 15800 does not address the issue of whether beneficiaries have standing to complain about breaches of trust *committed during* the period of revocability *after* the settlor dies or becomes incompetent.

Arguably, Section 15800 is ambiguous because it is unclear whether remainder beneficiaries are only barred from seeking relief for a breach of trust "during" the period of revocability or as the Court of Appeal argued, they are forever barred from seeking any relief. Where the text of a statute does not resolve an issue of its interpretation, the court should review the legislative history and apply principles of statutory construction. *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.

The Law Revision Commission Comments to Section 15800 suggests that beneficiaries do have standing to challenge the trustee's activities during the period of revocability after the settlor dies. It provides that "[t]his section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust." A "postponement" of the rights implies that they were held in abeyance for the time when the settlor was alive, which is distinct from saying that they never existed.

A critical principle of statutory construction requires that a court construe related statutes so that they harmonize with each other. Thus, the court "should construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Clean Air Constituency v. California State Air Resources Board* (1974) 11 Cal.3d 801, 813 – 814. It is also a settled principle of statutory construction that courts should "strive to give meaning to every word in a statute and to avoid constructions that render words, phrases or

clauses superfluous." *Klein v. United States of America* (2010) 50 Cal.4th 68, 80.

A harmonious reading of Probate Code sections 15800 and 15801 supports an intent by the Legislature to give remainder beneficiaries standing after the settlor dies to seek redress for a breach of trust committed during the settlor's lifetime. Probate Code section 15801, titled, "Consent by beneficiary of revocable trust," provides that:

> "In any case where the consent of a beneficiary may be given or is required to be given before an action may be taken, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the power to consent or withhold consent."

Under Section 15801, the settlor's consent during the period of revocability binds all of the beneficiaries and protects the trustee from liability. (See Cal. Law Revision Commission Comment, P. C. § 15801 ["the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability"].) In other words, if the trustee has *not* obtained consent from the settlor, he must be liable to someone.

The Opinion fails to harmonize Section 15800 with Section 15801 to give both statutes purpose and effect. Read together, these statutes clearly contemplate as a given that a beneficiary has standing to complain after the settlor's death about actions by the trustee during the time when the trust remained revocable for which no consent was obtained. The Court of Appeal's holding renders Section 15801 meaningless and superfluous because a beneficiary would never have standing to challenge whether the settlor consented to an apparent breach or whether a breach existed when no consent was obtained. If, as the Court of Appeal argues, a beneficiary never has any rights regarding the period of revocability under Section 15800, the issue of whether or not the settlor consents is irrelevant. The

holding in the Opinion judicially legislates Section 15801 out of existence. This could not have been the intent of the Legislature.

The Opinion expresses concern that allowing beneficiaries to challenge acts of the trustee taken during the settlor's lifetime would "put the trustee in an impossible position" because the trustee must follow the settlor's directions while the settlor is alive, "even if it harms the expectations of the beneficiaries," but after the settlor dies, the trustee could be held liable to the beneficiaries for a diminishment of the trust estate. (Opinion, p. 21.) The Opinion then gives a hypothetical example of a settlor who requests money to take his mistress on a six-month cruise around the world. (*Id.*)

This hypothetical misses the point for multiple reasons. First, as long as the settlor was competent when instructions were given to the trustee, the beneficiary's claims would be barred by the settlor's consent under Section 15801. Second, the Court of Appeal's hypothetical would fall squarely under Section 3.1 of the Trust as a direct distribution to the settlor for his health, support and maintenance. (ASA, Vol. I, pp. 100 – 101.) It is patently obvious that this section exists to allow the settlor to have whatever *he* wants during his lifetime and no one can challenge the trustee for accommodating that. The issue at hand is whether the trustee's actions or investment decisions were approved or directed by a signed writing delivered to the trustee as required by Sections 2.6 and 2.8 of the Trust. (*Id.* at pp. 99 – 100.) Under Section 2.8, Bill could only direct the investments of the Trust and actions of Tim as trustee by signed instructions delivered to Tim. The trial court found that no written instructions were provided with respect to the SafeTzone investment or the hundreds of thousands of dollars in loans and other payments to Tim and Patrick, as required by the Trust language.

The Opinion contains reckless dicta by ignoring the difference between trust corpus simply given to the settlor for his benefit (Section 3.1) as opposed to Trust corpus invested by the Trustee in violation of numerous codified fiduciary duties without specifically understood written directions authorizing or approving those investments. The Court of Appeal's cavalier hypothetical of allowing the settlor to go around the world with his mistress blatantly ignores the real protection provided by the Trust which would prohibit the Trustee from self-dealing unless he had written directions so authorizing him (Article 2.) This isn't a joke; the Court of Appeal allowed Tim to confiscate his father's hard-earned wealth for his own selfish purposes in defiance of the trial court's findings based on substantial evidence.

3. The Decision In *Evangelho v. Presoto* Comports with the Legislature's Intent to Provide a Remedy for Undetected Breaches of Trust Committed During the Period of Revocability.

The opinion in *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615 ("*Evangelho*") interpreted Probate Code sections 15800 and 16069(b) (formerly 16064(b)) consistent with a remainder beneficiary's right to seek redress for trustee misconduct during the period of revocability. In *Evangelho,* Joan Evangelho created a revocable trust. *Evangelho*, 67 Cal.App.4th at 618. The case concerned the actions of defendant Presoto as trustee of the trust. Among the assets of the trust was a PaineWebber brokerage account which at the time the trust was created had a value of approximately $450,000, but at the time of decedent's death the account was worth approximately $132,000. *Id.* at 619. Following decedent's death, the petitioners filed a petition under Probate Code § 17200(b)(7) to "compel trustee to account to beneficiaries and to compel redress of breach of trust." *Id* This petition sought an accounting from the date the trust was

created. *Id* Presoto relied on Probate Code § 15800 to assert that the beneficiaries could not compel an accounting for any time when the trust was revocable. *Id.* at 623.

The *Evangelho* court held that the clear import of Probate Code §§ 15800 and 16069[4] was to postpone the enjoyment of rights under the trust law by contingent beneficiaries while the settlor could revoke or modify the trust. *Id.* at 623-24. However, "when the person holding the power to revoke dies, the rights of contingent beneficiaries are no longer contingent. Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under division 9, the trust law." *Id.* at 624. "Once the decedent died, the right to compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id*

Evangelho also considered the overall purpose of the legislature in enacting these sections and found "the actual words of the code sections and the Law Revision Commission reveal the will of the Legislature to be that only decedent as settlor could compel an accounting while she was alive and competent. But once decedent died, the right to compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id* As to the specific remedies available to the beneficiaries, *Evangelho* holds that "regarding the scope of the accounting, the code sections grant broad equitable powers for the protection of beneficiaries. The matter of determining the appropriate equitable relief to be granted to a beneficiary is generally left to the good judgment of the trial court." *Id*

---

[4] When *Evangelho* was decided, the present text of Probate Code §16069(a) - "in the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked" was included in Probate Code §16064(b). See *Evangelho*, 617 Cal.App.4th at 623, fn. 6. This language was moved to section 16069 *unchanged* in the 2010 revisions to the Probate Code.

(citing *Rivero v. Thomas* (1948) 86 Cal.App.2d 225, 238.) Therefore, "[the trustee's] conduct can be attacked for fraud or bad faith and an accounting compelled for improper acts which had been hidden from the ultimate beneficiaries." *Evangelho*, 67 Cal.App at 624

Petitioners, like the beneficiaries in *Evangelho*, properly brought a petition compelling Tim to account for the Trust from the date of its creation (February 11, 2002), through the date of Bill's death, May 5, 2005, which was granted. This order is the same as the order in *Evangelho* as it requires an accounting for the period of revocability after the trust became irrevocable.

The Opinion holds that there is no such right, no standing and no recourse for the misconduct revealed by the court-ordered accounting. In its Opinion, the Court of Appeal acknowledged that the Trial Court had ruled in accordance with the case of *Evangelho*, but expressly held it found *Evangelho* "unpersuasive, and decline[d] to follow it." (Opinion, pg. 20.) *Evangelho* was factually and legally analogous to Petitioners' claims, and should have been followed by the Court of Appeal. In addition, Petitioners' claims are even stronger than those in *Evangelho* because as an added element, the trial court considered and found that Bill lacked capacity.

The Court of Appeal endeavored to support its disregard of *Evangelho* in light of several subsequent California appellate court decisions on points of law relating to revocable trusts and the Probate Code. However, none of these decisions expressly or impliedly disapprove of the result in *Evangelho.*

One case cited in the Court of Appeal's Opinion, *Johnson v. Kotcyk* (1999) 76 Cal.App.4th 83, does not affect the *Evangelho* decision, and in fact is logically consistent. In *Johnson*, a beneficiary of a trust sought accountings while the settlor of the revocable trust was still alive, but subject to a conservatorship. The beneficiary argued that Probate Code

section 15800 did not apply as the settlor of the trust could no longer revoke it as she had become incompetent. The *Johnson* court disagreed and relied upon Probate Code § 2580 to determine that the conservator, in conjunction with the probate court, was the person holding the power to modify or revoke the trust instrument, and was competent to do so. As the rights still were held by a living settlor pursuant to section 15800, the remainder beneficiary had no ability to compel an accounting.

The holdings of *Johnson* and *Evangelho* are entirely consistent. During the lifetime of the settlor (or other person holding the power to revoke), the remainder beneficiaries have no standing to seek an accounting (*Johnson*), but they do have standing to do so at the discretion of the trial court after the settlor dies (*Evangelho*. Petitioners do not assert that they could have compelled an accounting from the trustee while Bill was alive. When Bill died, however, the Trust became irrevocable and all the postponed rights under the Trust became actionable by the now vested beneficiaries.

Similarly to *Johnson*, the Court of Appeal stated that one of its reasons for not following *Evangelho* was a subsequent Supreme Court opinion, *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, based upon language in that case which affirmed that a "settlor with revocation power 'retains the power and control of the trustee and can with a stroke of the pen divest the beneficiaries of their interest." *Steinhart* at 1320. The Court of Appeal specifically referenced its belief that *Evangelho* "did not have the benefit of the Supreme Court's opinion in *Steinhart* [citation omitted] with its clear explanation of the nature of a revocable trust, to aid in its interpretation of Probate Code Section 15800." *Steinhart*, however, concerned an entirely different subject matter, namely an appeal of an assessment of property tax and specifically when a change in ownership of real property occurred for purposes of Proposition 13. *Steinhart,* 47 Cal.4th

at 1303. More significantly, the Court of Appeal ignores the fact that the settlor of the revocable trust in *Steinhart* acted as the trustee of her own trust. She did not appoint a third party trustee to act during her lifetime. Thus, the *Steinhart* court did not need to address the issues presented here where the settlor appoints a third party trustee.

The point of law referenced in *Steinhart* on which the Court of Appeal relied, that a settlor of a revocable trust can divest beneficiaries of their interest, is law that was well established in 1998 when *Evangelho* was decided and indeed for many decades prior. In fact, the citation in question actually cites to cases from 1923 and 1948 for this proposition. *Id.* at 1319-1320. *Steinhart* does not introduce any new law or concepts which alter the result in *Evangelho*. Petitioners do not dispute that they could have been divested of their beneficial interest during Bill's lifetime and while he was competent. They were not divested. All petitions in this case occurred following Bill's death. Petitioners sought redress for Tim's actions that were made while Bill possessed diminished capacity, for which he did not have Bill's consent and which were egregious breaches of the Trust.

The probate statutes referenced in the Opinion, Probate Code §§ 15800 and 16069 similarly did not change the applicable law between *Evangelho* and *Steinhart*. Section 15800 has continuously provided that Tim's duties were owed to Bill "during the time the trust was revocable." The critical language in Probate Code § 16069(a), which was formerly § 16064(b) in 1998 when *Evangelho* was decided, did not change, except for the number of the statute. These Probate Code sections which pertain to rights and duties in the period while the Trust is revocable, alternate in their description of the applicable period. One (section 15800) using the term "during" and the other (16069, and previously 16064(b)) saying "for." *Evangelho* which relied upon both sections, used the two words interchangeably. *Evangelho, 67* Cal.App.4th at 623.

The Opinion narrowly interprets the phase, "*for the period* when the trust may be revoked," (italics added) to mean that a trustee never needs to render an accounting that covers the period of revocability – that the Legislature would have used the word "during" in place of "for" if it intended that rights to an accounting were not available while the trust was revocable, but became available after the period of revocability. (Opinion, p. 22.) However, the meanings of the word "for" include "during" and "throughout." Black's Law Dictionary (6th ed. 1990) p. 644. The phrase "for the period" in Section 16069 certainly could have been intended by the Legislature to mean, "during the period," consistent with the Law Revision Comment that the rights of beneficiaries are merely postponed until the death of the settlor. Thus, the Court of Appeal in its Opinion improperly relied on the difference in the word used without regard to the synonymous definitions. (Opinion, at page 22.)

The Opinion also fails to distinguish between accountings as a matter of right under Probate Code section 16069 and accountings as a matter of remedy under Probate Code section 16420(b). Assuming, *arguendo*, that Section 16069 provides that beneficiaries have no absolute right under that section to an accounting covering the period when the trust was revocable, it does not also preclude beneficiaries from obtaining an accounting as a remedy upon a showing that breaches of trust may have occurred. Section 16420(b) invests the court with authority to "resort to any . . . appropriate remedy provided by statute or the common law" to redress breaches of trust. Section 16421 provides that "[t]he remedies of a beneficiary against the trustee are exclusively in equity." An accounting, of course, is an equitable remedy found in both statutes and common law. Prob. C. §§ 16420, 16421; *Copley v. Copley* (1981) 126 Cal.App.3d 248, 282 – 283; *Jogani v. Sup.Ct.* (2008) 165 Cal.App.4th 901, 909 – 910. The

trial court should be permitted as necessary to order an accounting to remedy trustee abuses and achieve justice for the beneficiaries.

4. The Court Of Appeal Opinion Is At Odds With The Common Law and Law of Other Jurisdictions.

The Court of Appeal decision is in conflict with recent common law sources and the law of other jurisdictions. The Restatement Third of Trusts (the "Restatement"), the Uniform Trust Code and other treatises agree that, once the settlor of a revocable trust passes away, the remainder beneficiaries can complain about actions taken by the trustee during the period of revocability, and the trustee may assert the settlor's consent as an affirmative defense.

In the absence of clear statutory provisions to the contrary, California follows the common law. Civ. Code § 22.2. "Statute and common law must be construed so as to avoid conflict, if reasonably possible." *Dry Creek Valley Ass'n, Inc. v. Board of Sup'rs of Sonoma County* (1977) 67 Cal.App.3d 839. 844; *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676 ["Unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules."]

In the trust law context, the Legislature enacted a safety-net provision for application of the common law, stating that unless a statute says otherwise, the courts should apply the common law. P. C. § 15002 ["Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of this state"]; *see also* Law Rev. Commission Comment, P.C. § 15002 ["common law" refers to "the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions."]

The Restatement § 74 discusses the effect of the settlor's consent and, similar to Probate Code section 15801, assumes as a given that the beneficiaries will have standing to complain about breaches of trust committed during the period of revocability once the settlor passes away. Rest.3d Trusts, § 74, com. b ["A trustee is not liable to the beneficiaries for a loss that results from compliance with a settlor's direction in accordance with the terms of that direction."] That section also emphasizes the trustee's need to document the settlor's directions, which would be irrelevant unless the trustee could potentially face liability to the beneficiaries. *Id.*, *see also* Rest.3d Trusts, § 74, com. c ["As a practical matter . . . *in the event of a surcharge action*, the trustee does run a risk in relying on unwritten evidence to support a defense based on settlor direction or authorization" (emphasis added.)]

The settlor's competence to consent to the actions by the trustee is also a critical issue addressed in the Restatement, which suggests that the settlor's capacity requires that the settlor be able to judge the risks and benefits of the proposed action. *Id.* at § 74, com. a(2 ["The rules stated in this Section apply to settlors . . . who have the mental capacity to exercise the power to revoke, withdraw, or appoint and *to make and understand the business, financial, personal, and other judgments appropriate to the matters involved in an exercise of authority or control under this Section*" (emphasis added); *see also id.*, § 74, com. e ["as long as the settlor has capacity to understand and evaluate information provided by the trustee regarding administration of the trust, the trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute. If, however, the settlor lacks this required capacity, the other beneficiaries are ordinarily entitled to exercise, on their own behalf, the usual rights of trust

beneficiaries, and the trustee is ordinarily under a duty to provide them with accountings and other information, concerning the trust and its administration . . ..”].

The facts of this case fall squarely within the circumstances under which the safeguards against trustee misconduct articulated in the Restatement are required. The Restatement contemplates, like the California Probate Code, that remainder beneficiaries may challenge whether an unsupervised trustee was directed or otherwise authorized by the settlor to make monumental investment decisions that substantially reduce the trust estate. Bill was found by the trial court to lack capacity to make a proper judgment regarding the SafeTzone investment, and his trustee, Tim, admittedly and self-servingly failed to provide the protection and guidance Bill deserved.

A treatise summarizing the law of trusts in the United States provides an effective synopsis of the rights of beneficiaries:

> Consistent with the rule that the duties of a trustee of a revocable trust are owed exclusively to the settlor, at least while the settlor has capacity, the rights of non-settlor beneficiaries of a revocable trust generally are subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime. After the settlor's death, of course, the trustee is accountable to the trust's other beneficiaries for its administration of the trust after the settlor's death. *Further, many courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct.*

Bogert's Trusts And Trustees, § 964 (emphasis added).

The UTC similarly agrees with the Restatement that beneficiaries have standing to sue over wrongs that occurred while the trust was revocable, with the issue being whether the settlor consented to the breach. Since completed in 2001, 23 states have enacted the UTC. The comments to Section 603 of the UTC state:

> Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. *However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee*. For the requirements of a consent, see Section 1009. (emphasis added).

Section 1009 of the UTC provides:

> A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:
>
> (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
>
> (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Thus, the consistent theme among the common law sources is that a settlor's informed consent relieves the trustee of liability to the remainder beneficiaries; however, if there is no consent, the trustee is exposed to actions by the remainder beneficiaries for breaches of trust.

Other jurisdictions permit beneficiaries of a revocable trust to seek redress after the settlor dies for breaches by a trustee committed while the trust was revocable. See, e.g., *Brundage v. Bank of America* (2008) 996

So.2d 877; *Smith v. Bank of Clearwater* (1985) 479 So.2d 755; *Siegel v. Novak* (2006) 920 So.2d 89 [Florida court applying New York law]; and *Cloud v. United States Nat'l Bank of Oregon* (1977) 280 Or. 83.

Florida, for instance, a State with one of the largest populations of persons over 65 years of age, follows this approach. Kirsten J. Colello, *CRS Report for Congress: Where Do Older Americans Live? Geographic Distribution of the Older Population*, March 5, 2007, Appendix Table 1, p. CRS-21 (See excerpts, attachment 1). In *Brundage v. Bank of America* (2008) 996 So.2d 877, the settlor appointed her niece and Bank of America to act as co-trustees of her revocable living trust. While the settlor was alive, the co-trustees transferred stock out of the trust and into a partnership created by the settlor. The settlor signed a joinder and consent to this transaction. However, one of the co-trustees, the settlor's niece, benefitted from the transfer of stock to the limited partnership. As a result, the remainder beneficiaries' gift of the stock was reduced, and they claimed that the co-trustees were liable for self-dealing. The Florida court held that the co-trustees owed no fiduciary duty to the remainder beneficiaries prior to the settlor's death. "However, once the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary." *Id.* at 882. Thus, the remainder beneficiaries acquired standing to challenge the trustee's actions once the settlor died, even as to actions taken during the settlor's lifetime.

The *Brundage* court also addressed the issue of the settlor's purported consent to the challenged transaction, and treated consent as an affirmative defense by the trustees, not an issue of the standing of the beneficiaries. *Id.* at 883. The beneficiaries claimed that the settlor's consent was void because she was incompetent at the time it was given. *Id.*

However, the trial court refused to admit evidence of the settlor's capacity to consent. *Id.* at 884. The Florida appellate court held that the refusal to admit this evidence was an abuse of discretion because "[w]hile a settlor can consent to any actions regarding the revocable trust . . . that ability ceases if the settlor becomes incapacitated." *Id.* at 833.

The Court of Appeal seems to conflate issues of standing and consent by suggesting throughout the Opinion that the settlor's consent bars the beneficiaries from even asserting a claim. But the more appropriate and prudent method of protecting the settlor's wishes is to treat the settlor's consent as an affirmative defense to complaints by remainder beneficiaries. The beneficiaries have the burden to prove conduct that amounts to a breach of fiduciary duty, but a remedy against trustee abuse is preserved.

In *Smith v. Bank of Clearwater* (1985) 479 So.2d 755 (cited by the *Brundage* court), the Florida Court of Appeal for the Second District held that a contingent beneficiary had standing to bring an action for mismanagement of the trust that occurred prior to the time that the beneficiary's interest in the trust vested. The lifetime beneficiary of the trust, Lucy, held a general power of appointment over the assets of the trust. After Lucy died, a contingent beneficiary sought to surcharge the trustee of the trust for mismanagement during Lucy's lifetime. The Court stated: "[a]lthough the alleged acts of trust mismanagement occurred during Lucy's lifetime, and the cause of action would have belonged to Lucy during her life, upon Lucy's death plaintiff became entitled to a share of the trust assets. If those assets were unlawfully diminished in value as plaintiff alleges, then plaintiff should have the right to suit to recover that lost value." *Id.* at 757.

In addition, the Court addressed an argument by the defendant, which is also raised in the Opinion, that any cause of action for mismanagement must be brought by the personal representative of Lucy's

estate. The Court responded that "[t]his might be true as to any diminution in value of any interest or other benefit actually received by Lucy from the trust which became a part of Lucy's estate. However, because Lucy exercised her power of appointment and gave plaintiff one-half of the trust assets remaining at Lucy's death, it is plaintiff, not Lucy's estate, who has been harmed if the alleged mismanagement did in fact result in a diminution in the value of the remaining trust assets." *Id.* at 757.

Smith also rejected the trial court's reasoning that the plaintiff lacked standing because Lucy had consented to the transactions by the trustee. Instead, the Florida court treated the issue of Lucy's consent as an affirmative defense involving a question of fact. *Id.* at 757.

In *Siegel v. Novak* (2006) 920 So.2d 89, at 95, the Florida Court of Appeal, Fourth District, applying New York law, held that "after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside the purposes authorized by the trust *and* which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument." *Siegel* recognized that there is a need for greater protection and thus standing should be available to remainder beneficiaries "[w]hen a person or entity different from the settlor removed property or money from a revocable trust [because] those withdrawals could conceivably be made without the settlor's knowledge or consent." *Id.* The court rejected the trustees' argument that the beneficiaries did not have standing and enunciated the significant public policy behind the existence of standing:

> "This result is contrary to our sense of justice – a trustee should not be able to violate its fiduciary duty and authorize withdrawals contrary to the provisions of the trust, and yet escape responsibility because the settlor did not discover the transgressions during her lifetime. With an interest in the

> corpus of the trust after the death of their mother, the Siegels have standing to challenge the disbursements; they have alleged a concrete and immediate injury, caused by [the trustees], which could be redressed by the circuit court. Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded . . .."

Id. at 97.

In *Cloud v. United States Nat'l Bank of Oregon* (1977) 280 Or. 83, the Oregon Supreme Court considered whether trustees breached their fiduciary duties to remainder beneficiaries by disbursing certain funds to the settlor's granddaughter while the settlor was still alive and arguably incompetent. The court did not deny the remainder beneficiaries standing to challenge the disbursements. Instead, the court explained that "a conclusion that the settlor was incompetent or subject to undue influence cannot end the inquiry; it must merely mean that the trustee has lost the absolute protection of being able to claim that it was following the valid instructions of the settlor." *Id.* at 90. The court applied a standard of ordinary prudence to the conduct of the trustee, such that the trustee was liable if he knew or should have known that settlor was incompetent or the transactions was otherwise invalid. *Id.* at 90, 92.

In jurisdictions where the courts have denied standing to remainder beneficiaries to complain about the trustee's conduct during the period of revocability, the settlor acted as a trustee of the trust during the settlor's lifetime, thus the settlor's consent to the action was not an issue. *See, e.g.*, *In re Estate of West* (Utah 1997) 948 P.2d 351, and *Moon v. Lesikar* (Tex.Ct.App. 2007) 230 S.W.3d 800.

Under *Evangelho*, California case law is in harmony with the Restatement, the UTC and the laws of numerous other jurisdictions. If the Opinion is preserved, California law will fall behind the national standard

for protecting its elderly from misconduct. In a state where a substantial and growing portion of the population is elderly, it would be wrong for California to be behind the prevailing view of necessary protections for its senior citizens.

5. The Legislature Has Authorized Remainder Beneficiaries To Recover Property on Behalf of the Trust That Was Wrongfully Taken Before the Beneficiaries' Interest in the Property Has Vested.

Significantly, the Legislature has conferred upon beneficiaries of a trust standing under the Probate Code to challenge *inter vivos* transfers of trust property of the kind that the Court of Appeal held beneficiaries could never have. In Part I, the Opinion argues that a beneficiary should not be able to challenge the disposition of trust property that occurred during the settlor's lifetime because the beneficiary had no vested interest in the property. The Opinion concludes that the lack of a vested interest during the settlor's lifetime forever precludes the beneficiary from ever asserting rights over the transferred property. (Opinion, pp. 19 – 20.)

However, beneficiaries are authorized by statute to petition the probate court to recover assets for the trust that were transferred during the settlor's lifetime, even though they had no interest in that property when it was conveyed. Probate Code section 850 permits any "interested person" to sue to bring assets back into the trust "[w]here the trustee has a claim to real or personal property, title to or possession of which is held by another." P. C. § 850(a)(3)(B). The definition of "interested person" includes a beneficiary. P. C. § 48(a)(1). For example, when a settlor loses his property as the result of undue influence and then dies, Probate Code section 850 allows his beneficiaries to seek to recover the property for the trust after the settlor's death. *See, e.g., In re Estate of Young* (2008) 160 Cal.App.4th 62. A beneficiary thus has the right to sue for events that

occurred during the settlor's lifetime despite the lack of a vested interest in the trust property when the property was conveyed.

This is significant for two reasons. First, it establishes that the Legislature has given beneficiaries rights to sue regarding events that occurred before they had vested rights in the trust property. Second, it confers rights to a beneficiary to bring an action to recover property on behalf of the trust. Thus, in the trust law context, the injured beneficiaries are authorized to redress wrongs that occurred before they had any interest in the trust property.

6. Petitioners Were Entitled to Pursue Their Rights to Redress Tim's Breaches of Trust as an Alternative to Contesting the Trust.

The Opinion misplaces emphasis on Petitioners' election not to pursue claims of lack of capacity, undue influence and elder abuse to challenge the Trust. The issue of whether Bill lacked testamentary capacity was never reached by the trial court because it was not pursued by Petitioners. Petitioners were not required to attack the validity of the Trust, and thus place them at risk of violating the Trust's "no contest" clause, to seek redress for Tim's misconduct as trustee. The fact that the Petitioners did not challenge Bill's testamentary capacity to understand the Trust, did not establish that he *had* that capacity. It simply was not an adjudicated issue. As demonstrated herein, Petitioners had remedies against Tim as trustee which they were entitled to pursue to redress injuries to them and the Trust.

7. The Opinion Unnecessarily Confines Remedies for Breaches of Trust to Alternatives That Are Less Efficient and Practical.

The remedies of allowing an accounting for the period while the trust is revocable and a possible surcharge for breaches of trust which are

eliminated by the Opinion are necessary alternatives for protecting elder's rights. Other actions, namely conservatorships or actions for elder abuse, are frequently not practical alternatives. While there are several legal proceedings which are similar to an action for breach of trust when a trustee takes advantage of an elder, none are satisfactory replacements.

a. *Conservatorship*

A conservatorship can be a tremendously difficult decision for a family. It puts a proposed conservatee squarely in the middle of litigation to prove that the proposed conservatee lacks capacity, and subjects the proposed conservatee to interviews, investigations and court appearances. A conservatorship can also be a source of embarrassment for the proposed conservatee when their capacity is publicly questioned. Conservatorships are extreme proceedings which are only warranted in extreme situations. A significant purpose of a trust is to allow a third party trustee or a successor trustee to take over without the necessity of a conservatorship. There is no public policy served by requiring remainder beneficiaries to institute a conservatorship in order to protect settlors from financial abuse.

b. *Elder Abuse*

While a cause of action for Elder Abuse does survive the death of the elder, there are several reasons why it is not adequate as an exclusive remedy when a decedent's assets were mismanaged in a trust by a third party trustee. Jury trials are allowed for elder abuse causes of action, but are not permitted for probate and trust cases. (P.C. §§ 825 and 17006). The Legislature determined that the emotional content of probate and trust matters would be better handled by judges rather than juries. Jury trials are more expensive than bench trials, and they require considerably more additional judicial resources. Thus, as a practical matter, eliminating

standing for remainder beneficiaries for relief for breaches of trust pursuant to the Probate Code forces those parties into much more expensive, time consuming and uncertain litigation.

The purpose of the Elder Abuse Act (Welf. & Inst. Code, § 15600, et seq.) is to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33. Thus the purpose of the Elder Abuse Act is enhanced by having additional remedies for remainder beneficiaries when a third party becomes a trustee of a revocable trust and takes advantage of an incapacitated trustor.

c. ***Action by Personal Representative.***

The Opinion states that an action against Tim could have been maintained by the personal representative. In this case, as in most cases, the culpable trustee during the Trustor's lifetime is also the designated personal representative. In practice, this would mean that the remainder beneficiaries, in addition to their action for breach of trust, would need to take an additional step and expend additional judicial resources by litigating with the named personal representative as to who should act as the personal representative. Then, assuming they prevail in the initial litigation, the remainder beneficiaries would have to undertake a second litigation as personal representatives to remedy the alleged wrongdoing. This extra litigation serves no judicial purpose, yet this is what the Opinion seeks to require.

VI. CONCLUSION

Many Californians seek to avoid the costs and inconvenience of conservatorships and probates, by executing trusts which allow a third party to take over as trustee of their assets during their lifetime. That

decision removes the oversight provided by the courts and the laws controlling conservatorships. Nevertheless the Legislature has provided through various protections in the Probate Code, that remainder beneficiaries, usually the settlor's children, can seek relief if the third party trustee violated the provisions of the Probate Code or the trust. Without the enforcement of those protections, elders are at increased risk to be victims of financial abuse and their intended beneficiaries have an increased likelihood of being denied their intended legacy. Therefore, Petitioners respectfully request that this court rule that Petitioners had standing to bring their petition for an accounting and for breaches of trust and that the surcharges found to be appropriate by the trial court be affirmed.

Respectfully submitted,

Dated: February 17, 2012

FREEMAN, FREEMAN &
SMILEY, LLP

By: ______________________

STEPHEN M. LOWE
JARED A. BARRY
Attorneys for Petitioners
CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN,
Plaintiffs and Respondents

1583812.3

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Rule 8.204(C) of the California Rules of Court, Petitioners' Opening Brief on the Merits is produced using 13-point Times Roman type, including footnotes, and contains 13,095 words. I relied upon the word count of our firm's computer program to prepare this brief.

Dated: February 17, 2012

FREEMAN, FREEMAN & SMILEY, LLP

By:

STEPHEN M. LOWE
JARED A. BARRY
Attorneys for Petitioners
CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN,
Plaintiffs and Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1888 Century Park East, Suite 1900, Los Angeles, California 90067.

On February 17, 2012, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action indicted on the attached Service List.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Freeman, Freeman & Smiley, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 17, 2012, at Los Angeles, California.

Clare Goldwasser

SERVICE LIST

Patricia Gray
1500 San Pasqual Street
Pasadena, CA 91106

Christine Giraldin
40080 Via Caballos
Murietta, CA 92562

Michael Giraldin
14051 Dall Lane
Tustin, CA 92780

Vicki Giraldin
24 Foxhill
Irvine, CA 92604

Mary Giraldin
75 Lakeshore
Irvine, CA 92604

Linda Rogers, Successor Trustee
c/o Stephen M. Magro, Esq.
Attorney at Law
14101 Yorba Street, Suite 101
Tustin, CA 92780

Claudia G. Kelly
478 Westridge Circle
Anaheim, CA 92807

Thomas W. Giraldin
1518 Sierra Lane
Los Banos, CA 93635-4645

Timothy W. Giraldin
Patrick W. Giraldin
c/o Howard Bidna
Bidna & Keys
5120 Campus Drive
Newport Beach, CA 92660

James P. Giraldin
20370 Skyhawk Lane
Topanga, CA 90290

Timothy Giraldin
1 Westford
Ladera Ranch, CA 92694

Patrick W. Giraldin
8 Bennington Path
Ladera Ranch, CA 92694

Mark A. Ross, Esq.
Ross Law Group, APC
1901 Newport Boulevard, Suite 284
Costa Mesa, CA 92627
Phone (949) 631-3374
Fax (714) 540-9575
Attorneys for Appellant Mary Giraldin

Clerk, Court of Appeal
Fourth District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Clerk, Superior Court
County of Orange
Lamoreaux Justice Center
341 The City Drive
Orange, CA 92668

Order Code RL33897

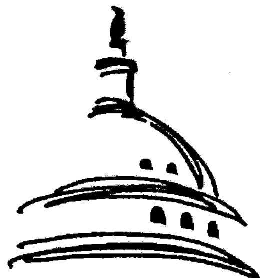
CRS Report for Congress

Where Do Older Americans Live? Geographic Distribution of the Older Population

March 5, 2007

Kirsten J. Colello
Analyst in Gerontology
Domestic Social Policy Division

Prepared for Members and
Committees of Congress



Where Do Older Americans Live? Geographic Distribution of the Older Population

Summary

The U.S. population age 65 and older grew steadily through most of the last century. U.S. Census Bureau population projections to 2030 indicate that further and more dramatic growth is still to come. This increase is, in part, due to longer life expectancies and the aging of the baby boom generation. As the older population continues to increase in size and proportion, and as individuals continue to live longer post-retirement, changes in where older Americans live, or the "geographic distribution" of the older population, will likely have broad policy implications for federal, state, and local governments.

Older Americans are not unlike the rest of the U.S. population in that they live in the most populous states (California, Florida, New York, and Texas). The majority of the population age 65 and older lives within major metropolitan areas. However, the older population accounts for a larger proportion of the total U.S. population living in non-metropolitan or rural areas. Some experts have expressed concern over the level of access older rural residents have to affordable housing and transportation options, health and social services, and medical providers and specialists.

Older Americans are less likely to move than the younger population, and of those who do move, most move within the same county or state. Among those moving to different states, the pattern has been to relocate from colder to warmer climates, from larger metropolitan areas to smaller cities and towns, and from higher to lower cost of living areas. Over the past few decades, migration patterns among the older population have led to an increase in the 65-and-older population in some states in the Southern and Western regions of the country. Other states in the Midwest and Northeast have relatively high proportions of their resident population age 65 and older, which is likely due to younger workers having left these regions combined with a pattern of many older individuals remaining in these communities.

Population shifts affect important aging policy issues that concern both the government and private sector, including social services, housing, health care, and transportation. At the federal level, funds for federal programs, such as nutrition and supportive services under the Older Americans Act (OAA) and the U.S. Department of Housing and Urban Development (HUD) Section 202 housing program for the elderly, are disbursed according to state population estimates. At the state and local levels, understanding geographic patterns and changes in population distribution can assist policy makers in targeting public funds for needed services, improve service delivery, and aid in community planning efforts.

In order to inform Congress about important patterns and changes in the older U.S. population, this report presents estimates of the geographic distribution of the older population and population growth rates by state, region, and selected major metropolitan statistical areas and counties. The report also provides a brief discussion of the policy implications of population growth as it relates to the federal government.

Where Do Older Americans Live? Geographic Distribution of the Older Population

Introduction

The U.S. population age 65 and older grew steadily through most of the 20th century. U.S. Census Bureau population projections to 2030 indicate that further and more dramatic growth is still to come. This increase is, in part, due to longer life expectancies and the aging of the baby boom generation (those born between 1946 and 1964).[1] In 2005, the "older population," defined as those individuals age 65 and older, was estimated at 37 million, marking a 5% increase from the 2000 decennial Census estimate of 35 million. Between 2005 and 2010, the older population is expected to increase by another 10%, to 40 million, and then by an additional 36%, to 55 million, by 2020. This dramatic growth in the older population is expected to begin in 2011, when the first of the baby boomers turn 65 years of age, and to continue beyond 2029, when the youngest of the boomers reach age 65. The Census projects that in 2030 the U.S. population will have an estimated 72 million older Americans, more than twice as many as the number estimated in 2000.[2]

In 2003, those who reached age 65 could expect to live an additional 18.5 years, on average (19.8 for women and 16.8 for men), or until 83.5 years of age.[3] And while the population age 85 and older represents a small segment of the older population, the "oldest-old," defined as those individuals age 85 and older, are in fact the fastest-growing segment of the older population. Between 2000 and 2005, the population age 85 and older increased by 20%, and is projected to increase by another 20%, to 6.1 million, by 2010. Between 2010 and 2020 the population age 85 and older is expected to increase an additional 20% to 7.3 million (see **Figure 1**).[4]

---

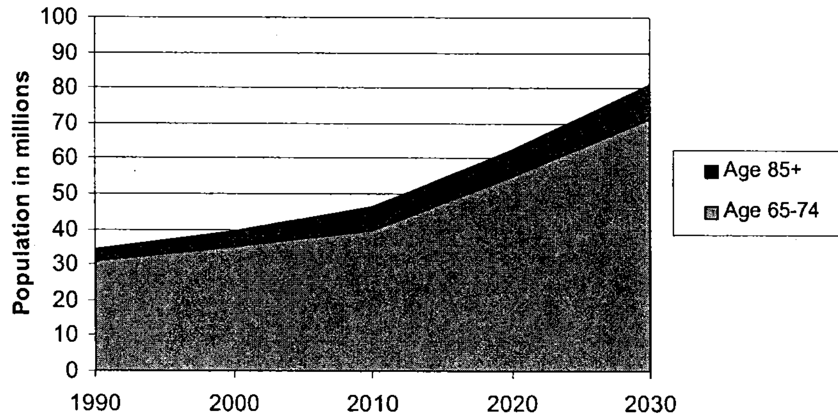
[1] For further information on U.S. demographic trends, see CRS Report RL32701, *The Changing Demographic Profile of the United States*, by Laura B. Shrestha.

[2] Federal Interagency Forum on Aging-Related Statistics, *Older Americans 2004: Key-Indicators of Well-Being*, Washington, DC: U.S. Government Printing Office, 2004. (Hereafter cited as: Federal Interagency Forum on Aging-Related Statistics, *Older Americans 2004*).

[3] Administration on Aging (AOA), U.S. Department of Health and Human Services, *A Profile of Older Americans: 2005*. (Hereafter cited as: AOA, *A Profile of Older Americans: 2005*). For further information, see CRS Report RL32792, *Life Expectancy in the United States*, by Laura B. Shrestha.

[4] Federal Interagency Forum on Aging-Related Statistics, *Older Americans 2004*.

Figure 1. U.S. Population Age 65 and Older and 85 and Older, 1990 to 2030 (projected)



Source: Federal Interagency Forum on Aging-Related Statistics, *Older Americans 2004*.

Note: Data for 1990 and 2000 are Census estimates of the population 65 and older and 85 and older. Data for 2010, 2020, and 2030 are Census population projections.

Today, the older population represents just over 12% of the U.S. population; about one in every eight Americans is age 65 or older. By 2030, the Census projects that one in every five, or 20% of the U.S. population, will be age 65 or older.[5] As the older population continues to increase in size and proportion, and as individuals continue to live longer post-retirement, changes in where older Americans live, or the "geographic distribution"of the older population, will likely have broad policy implications for federal, state, and local governments.

Population shifts affect important aging policy issues that concern both the government and private sector, including social services, housing, health care, and transportation. At the federal level, funds for federal programs, such as nutrition and supportive services under the Older Americans Act (OAA) and the U.S. Department of Housing and Urban Development (HUD) Section 202 housing program for the elderly, are disbursed according to state population estimates.[6] Furthermore, understanding geographic patterns and changes in population distribution at the state and local levels can assist policymakers in targeting public funds for needed services, help improve service delivery, and aid in community planning efforts.

In order to inform Congress about important patterns and changes in the older U.S. population, this report presents estimates of the geographic distribution of the

---

[5] He, Wan, et al., U.S. Census Bureau, Current Population Reports, P23-209, *65+ in the United States: 2005*, Washington, DC: U.S. Government Printing Office, 2005. (Hereafter referred to as: He, *65+ in the United States: 2005*).

[6] For further information on Older Americans Act funding formulas, see CRS Report RS22549, *Older Americans Act: Funding Formulas*, by Kirsten J. Colello. For further information on HUD Section 202 funding formula, see CRS Report RL33508, *Section 202 and Other HUD Rental Housing Programs for the Low-Income Elderly*, by Libby Perl.

older population and population growth rates by state, region, and selected major metropolitan statistical areas and counties. This report also provides a brief discussion of the policy implications of population growth as it relates to the federal government.

Geographic Distribution of the Older Population

Older Americans are not unlike the rest of the U.S. population in that they live in the most populous states and within major metropolitan areas. While older Americans are less likely to move than the younger population, of those who do move, most move within the same county or state.[7] Among those moving to a different state, their pattern has been to relocate from colder to warmer climates, from larger metropolitan areas to smaller cities and towns, and from higher to lower cost of living areas.[8] Over the past few decades, this has led to increases in the older population in some states in the South and West, and in major metropolitan areas and counties within these states.

Changes in the geographic distribution of the older population affect not only the states on the receiving end of retirement migration, but states experiencing population change due to older and younger residents leaving the state, often referred to as "out-migration." For example, out-migration has had a large impact on the age distribution of the population in some states in the Midwest and Northeast, particularly as young workers have left work in the farming and mining industries. In some of these states, a greater share of the state's resident population is growing older, but not moving, a concept often referred to as "aging in place."[9] In addition to migration patterns among older and younger residents, differences in the proportion of a state's older resident population are determined by patterns of fertility. Generally, states with high fertility rates have a higher proportion of younger residents and a lower proportion of older residents.

According to some researchers, the changing geographic distribution of the older population may result in disparities between resources and needs, including medical services, social services, housing, and long-term care.[10] This section of the report presents estimates of the older population by state and region, as well as data

---

[7] He, *65+ in the United States: 2005.*

[8] Longino, Charles F. and Don E. Bradley, *A First Look at Retirement Migration Trends in 2000*, The Gerontologist, vol. 43, no. 6, pp. 904-907, 2003. (Hereafter referred to as: Longino, *A First Look at Retirement Migration Trends*, 2003).

[9] Himes, Christine L., *Population Bulletin: Elderly Americans*, vol. 56, no. 4, Population Reference Bureau, December 2001. (Hereafter referred to as Himes, *Elderly Americans*, 2001).

[10] Rogers, Carolyn C., *Changes in the Older Population and Implications for Rural Areas*, Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture, Rural Development Research Report, no. 90, Washington, DC, December 1999. (Hereafter referred to as Rogers, *Changes in the Older Population*, 1999). This report defines the older population as 60 and older.

on population change by region and selected metropolitan statistical areas and counties.

State Distribution of Population. In general, the most populous states account for the largest number of older Americans; conversely, the least populous states have the fewest number of older Americans. In 2005, just over half of the total U.S. population age 65 and older (54%) lived in 10 states — California, Florida, New York, Texas, Pennsylvania, Ohio, Illinois, Michigan, New Jersey, and North Carolina (see **Table 1**). With the exception of North Carolina, these 10 states also happen to be the ten most populous states. The top four states with respect to total population size (California, Florida, New York, and Texas) each had over 2 million older Americans and accounted for almost one-third of the entire U.S. older population (31%). The remaining six states each had more than 1 million older Americans.

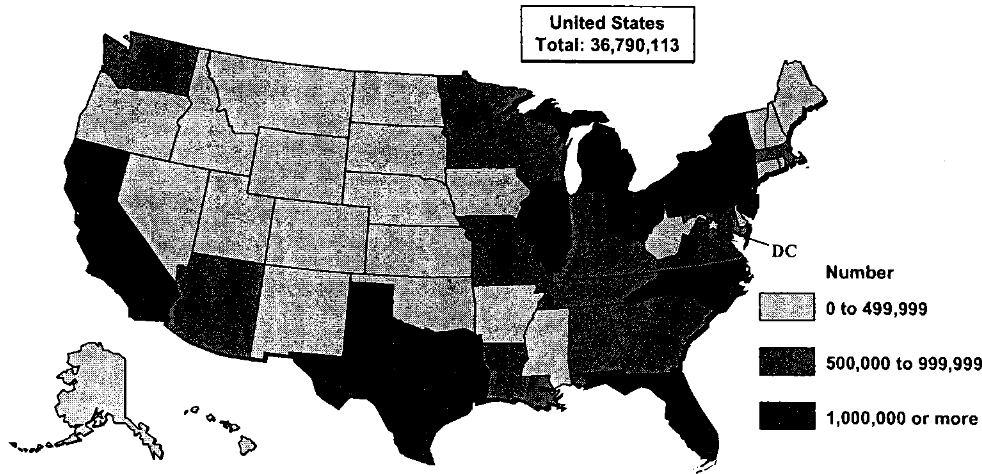
Table 1. Top Ten States Ranked by Population and Percent of U.S. Population Age 65 and Older, 2005

Rank	State	Number	Percent of U.S. population 65 and older
1.	California	3,868,574	10.52
2.	Florida	2,993,160	8.14
3.	New York	2,515,064	6.84
4.	Texas	2,271,845	6.18
5.	Pennsylvania	1,892,847	5.14
6.	Ohio	1,530,074	4.16
7.	Illinois	1,529,430	4.16
8.	Michigan	1,258,494	3.42
9.	New Jersey	1,129,356	3.07
10.	North Carolina	1,054,098	2.87
	Total	**20,042,942**	**54.50**

Source: CRS compilation based on data from the U.S. Census Bureau.

States with small populations, such as South Dakota, North Dakota, Vermont, Wyoming, and Alaska and the District of Columbia had fewer older Americans. In 2005, just 1% of the older population lived in these five states and the District of Columbia. The size of the older population in these states ranged between 44,000 in Alaska and 110,000 in South Dakota. **Figure 2** shows a map of the U.S. population age 65 and older by state. A complete list of states ranked by the number of older residents and percent of the U.S. population age 65 and older is presented in **Appendix Table 1**.

Figure 2. U.S. Population Age 65 and Older by State, 2005

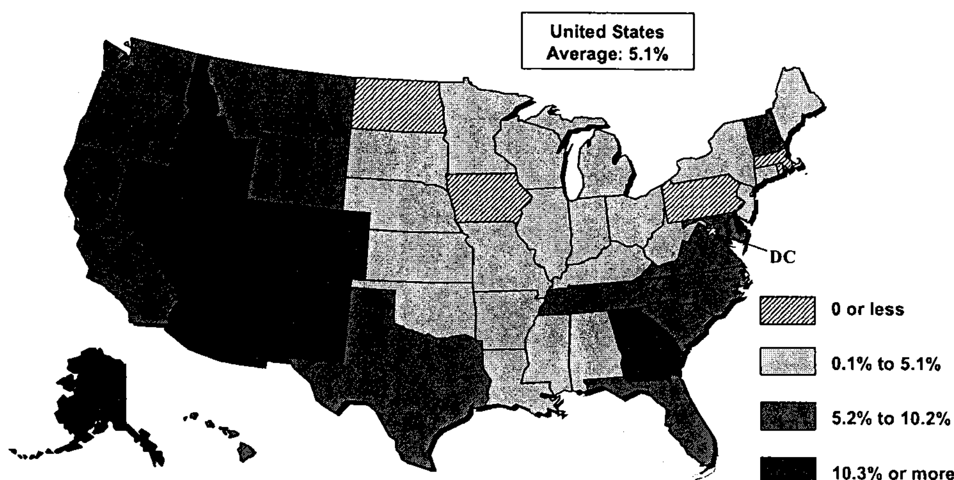


Source: CRS compilation based on data from the U.S. Census Bureau.

Generally, the states that had the largest number of older Americans in 2005 were not the same states with the largest proportion of older residents (with the exception of Florida and Pennsylvania). The first population statistic refers to the distribution of the total U.S. population age 65 and older by state, the second statistic refers to the distribution of the population age 65 and older *within* a state, that is, the proportion of the state's older residents relative to the state's total resident population.[11] **Table 2** shows the top 10 states ranked by percent of the state's resident population age 65 and older, and the bottom 10 states with the smallest proportion of older residents.

[11] This report refers to the proportion of the state's population age 65 and older relative to the total U.S. population age 65 and older as the *percent of the U.S. population 65 and older by state*. The proportion of the state's population age 65 and older relative to the total state population, in this report, is referred to as the *percent of the state's resident population age 65 and older*.

Figure 4. Growth Rate of the Population Age 65 and Older by State, 2000 to 2005



Source: CRS compilation based on data from the U.S. Census Bureau.

Dramatic growth of the oldest-old population occurred in several states between 2000 and 2005. Nine states experienced increases in their population age 85 and older of about one-third or more: Hawaii, Nevada, Alaska, Delaware, Connecticut, Maryland, Arizona, Rhode Island, and Washington. However, five of these states have less than 30,000 individuals age 85 and older (Hawaii, Nevada, Alaska, Delaware, and Rhode Island). The remaining four states had more than 80,000 oldest-old residents.

The same states that experienced overall declines in their population age 65 and older had increases in their oldest-old population during the same five-year time period. This further suggests that retirement migration of a "younger" senior population, that is, those age 65 to 74, may leave some states with an increasing oldest-old population that is aging in place and more likely to be frail or in need of health and supportive services. Two states, Oklahoma and Mississippi, experienced declines in their oldest-old population over the same five-year period. **Figure 5** shows a map of the United States with the five-year growth of the population age 85 and older by state. A detailed table with the percent changes in the population age 85 and older for all the states is provided in **Appendix Table 5**.

Appendix Table 1. States Ranked by the Number and Percent of U.S. Population Age 65 and Older, 2005

Rank	State	Number of people 65 and older	Percent of U.S. population 65 and older
1.	California	3,868,574	10.52
2.	Florida	2,993,160	8.14
3.	New York	2,515,064	6.84
4.	Texas	2,271,845	6.18
5.	Pennsylvania	1,892,847	5.14
6.	Illinois	1,530,074	4.16
7.	Ohio	1,529,430	4.16
8.	Michigan	1,258,494	3.42
9.	New Jersey	1,129,356	3.07
10.	North Carolina	1,054,098	2.87
11.	Georgia	870,422	2.37
12.	Virginia	865,103	2.35
13.	Massachusetts	852,826	2.32
14.	Indiana	777,506	2.11
15.	Missouri	773,171	2.10
16.	Arizona	758,181	2.06
17.	Tennessee	749,951	2.04
18.	Wisconsin	721,633	1.96
19.	Washington	720,874	1.96
20.	Maryland	644,560	1.75
21.	Minnesota	623,241	1.69
22.	Alabama	603,733	1.64
23.	South Carolina	534,980	1.45
24.	Louisiana	531,581	1.44
25.	Kentucky	525,764	1.43
26.	Connecticut	474,150	1.29
27.	Oregon	469,906	1.28
28.	Oklahoma	468,968	1.27
29.	Colorado	465,096	1.26
30.	Iowa	435,220	1.18
31.	Arkansas	384,450	1.04

Rank	State	Number of people 65 and older	Percent of U.S. population 65 and older
32.	Mississippi	358,393	0.97
33.	Kansas	357,005	0.97
34.	West Virginia	278,368	0.76
35.	Nevada	273,136	0.74
36.	New Mexico	234,902	0.64
37.	Nebraska	233,550	0.63
38.	Utah	216,021	0.59
39.	Maine	192,664	0.52
40.	Hawaii	174,538	0.47
41.	Idaho	163,917	0.45
42.	New Hampshire	163,105	0.44
43.	Rhode Island	149,775	0.41
44.	Montana	128,834	0.35
45.	Delaware	112,214	0.31
46.	South Dakota	110,530	0.30
47.	North Dakota	93,650	0.25
48.	Vermont	81,982	0.22
49.	District of Columbia	67,208	0.18
50.	Wyoming	62,037	0.17
51.	Alaska	44,026	0.12
	United States	**36,790,113**	**100.00**

Source: CRS compilation based on data from the U.S. Census Bureau.